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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

In re STANLEY CARTER WALLACE,

on Habeas Corpus.

2d Civil No. B238791
(Super. Ct. No. 1369436)
(Santa Barbara County)

Matthew Cate, the Secretary of the California Department of Corrections and Rehabilitation (CDCR), appeals a judgment granting Stanley Carter Wallace's petition for writ of habeas corpus. Wallace is "subject to lifetime registration as a sex offender." (Pen. Code, § 290.)¹ A parole condition requires that he not reside "within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b) (Jessica's Law).) The trial court found this restriction overly broad as applied to Wallace because "[t]here is no stated purpose or rationality for restricting sex offenders who do not target children from living near schools or parks."

We conclude the trial court did not follow the procedure for deciding "as-applied" constitutional challenges to Jessica's Law. (*In re E.J.* (2010) 47 Cal.4th 1258, 1283-1284.) It did not conduct an evidentiary hearing so that it could make the necessary findings required for an "as-applied" challenge. (*Ibid.*) We reverse and remand.

¹ All statutory references are to the Penal Code.

FACTS

In the ballot pamphlet for Proposition 83, the proponents claimed they "sought to achieve" the "goal of creating 'predator free zones around schools and parks to prevent sex offenders from living near where our children learn and play.'" (*In re E.J.*, *supra*, 47 Cal.4th at p. 1266.) As a result of the passage of that initiative, it became "unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5(b).)" (*Ibid.*)

In 1988, Wallace was convicted of "sexual battery" against an adult cohabitant. (§ 243.4.) As a result of that conviction, he is "subject to lifetime registration as a sex offender." (§ 290.) Wallace was sentenced to a state prison term and was released on parole in 1990.

In 2006, he pled no contest to intimidating a witness. (§ 136.1, subd. (b)(1).) The trial court suspended execution of a three-year state prison sentence and placed him on probation for three years. The court subsequently found that Wallace had "violated the terms of his probation on numerous occasions." It sentenced him to three years in state prison. During the sentencing hearing, the prosecutor noted that Wallace's criminal history reflects that "he's also been violent and threatening and scaring children by his behavior."

Wallace was released on parole on December 18, 2010. He was "returned to custody after a May 26, 2011 parole revocation."

Wallace filed a petition for writ of habeas corpus alleging the 2,000-foot restriction is "overbroad as applied to [him]." He said, "The practical effect of this condition is to prevent [him] from living in any residence or home, since virtually all affordable residential areas of the county in which he is required to live are within the 2,000 foot limit."

In the return to that petition, Cate alleged there was affordable housing within Santa Barbara County and Wallace did not make "any attempt to comply with the law or locate compliant housing."

The trial court did not hold an evidentiary hearing. It listened to arguments by counsel. In granting the habeas petition, it ruled, "[T]he residency restriction in Penal Code § 3003.5, imposed on [Wallace] as a condition of his parole, is unconstitutional as applied to [Wallace] because his offense did not involve a minor."

DISCUSSION

The As-Applied Constitutional Challenge to the 2,000-Foot Restriction

Cate contends section 3003.5 does not violate the constitutional right of parolees to travel or impair their privacy interests in determining where they will reside. But the facial validity of this statute is not at issue here. In his habeas petition, Wallace alleged the 2,000-foot restriction *as applied* to Santa Barbara prevents him from finding housing.

Parole conditions "may govern a parolee's residence, his associates or living companions, his travel, his use of intoxicants, and other aspects of his life." (*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 874.) As Cate correctly notes: 1) the 2,000-foot restriction does not expressly prohibit Wallace from travelling to a school or a park; 2) as a general rule, a parolee does not have the right "to choose his own residence" (*In re Faucette* (1967) 253 Cal.App.2d 338, 341); 3) statutes that limited where parolees may reside have passed "constitutional muster" (*Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 567); and 4) there are strong justifications for intensive restrictions on sex offenders because the Legislature "perceives that [they] pose a 'continuing threat to society' [citation] and require constant vigilance" (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527).

But even so, a statute that is facially valid may be unconstitutional if it is applied so as to deprive "the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

Wallace contends that because the 2,000-foot restriction is to protect children, it is an unreasonable parole condition because he committed no crimes against children.

Parole "conditions must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action." (*Terhune v. Superior Court*, *supra*, 65 Cal.App.4th at p. 874.) Consequently, they may raise "as-applied" constitutional challenges to the 2,000-foot restriction at evidentiary hearings. (*In re E.J.*, *supra*, 47 Cal.4th at pp. 1265, 1283-1284.)

But here the trial court did not conduct an evidentiary hearing and it did not make the findings required for an "as-applied" Jessica's Law challenge. (*In re E.J.*, *supra*, 47 Cal.4th at pp. 1283-1284.) In *In re E.J.*, sex offenders on parole for "nonsex offenses" petitioned for habeas relief from the 2,000-foot restriction claiming it was unconstitutional as applied to them. Some of the petitioners who claimed the restriction was overbroad had no history of committing sexual offenses against children. (*Id.* at p. 1296.) But the Supreme Court did not grant their habeas petitions. Nor did it rule that the restriction was overbroad because their sex offenses did not involve children.

Instead, the court remanded their cases with instructions that the trial courts conduct evidentiary hearings and make fact findings on several issues that went beyond the facts of their convictions. The court said, "These facts would include, but are not necessarily limited to, establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest 'public or private school, or park where children regularly gather' [citation]; a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in each particular jurisdiction; and a complete record of the protocol CDCR is currently following to enforce section 3003.5(b) in those respective jurisdictions." (*In re E.J.*, *supra*, 47 Cal.4th at pp. 1283-1284.)

Here the trial court ruled "an evidentiary hearing is unnecessary" because Wallace's sex offense "did not involve a minor." But the factual record is incomplete. The court in *In re E.J.* said the "as-applied" constitutional challenges to Jessica's Law involve a variety of "complex" issues. (*In re E.J.*, *supra*, 47 Cal.4th at p. 1264.)

Consequently, "evidentiary hearings . . . *have to be conducted to establish the relevant facts* necessary to decide each claim." (*Id.* at p. 1265, italics added.)

Wallace claimed his case is analogous to *In re E.J.*; the allegations of his petition involve the same factual issues raised by the *In re E.J.* petitioners. His petition is based on the factual claims that: 1) the restriction prevented him "from living in any residence or home," 2) "virtually all affordable residential areas of the county in which he is required to live are within the 2,000 foot limit," 3) his parole officer gave him conflicting information about exceptions to the 2,000-foot limit, and 4) CDCR policies regarding exceptions to the restriction and residency definitions are confusing.

In the return to the petition, Cate denied Wallace's factual allegations and he raised additional factual issues, including: 1) Wallace did not make "any attempt to comply with the law or locate compliant housing," and 2) there "is ample, affordable compliant housing in Santa Barbara County." In Wallace's "Denial to the Return," he alleged that he was entitled to assistance in locating "compliant" housing and there were no homeless shelters outside of the restricted areas.

The trial court erred by not conducting an evidentiary hearing to resolve these factual disputes and by not making factual findings on these relevant issues. (*In re E.J.*, *supra*, 47 Cal.4th at pp. 1264, 1283-1284.) The "*extent of housing in compliance with section 3003.5(b) available to [parolees] during their terms of parole [is] a matter critical to deciding the merits of their 'as applied' constitutional challenges.*" (*Id.* at p. 1265, italics added.)

Here the trial court ruled that it would not decide any housing issues because it did not consider them to be relevant. But the housing issues constitute the basis for the habeas petition. The court granted the petition solely on the ground that Wallace had not committed sex offenses against children. But if a ruling on that issue alone was sufficient to justify habeas relief, the result in *In re E.J.* would have been different. The Supreme Court would have granted relief for those petitioners who had not committed sex offenses against children. Instead, it remanded those cases because

findings on *all* the additional issues it identified were essential in determining whether habeas relief was appropriate.

Wallace correctly notes that a parolee's criminal history is a relevant factor in deciding whether the restriction here is valid. But that is not the only factor. Our Supreme Court's approach requires consideration of the "totality of circumstances" and a careful weighing of all the factors for each individual. The trial court relied on counsels' arguments, but they are not a substitute for evidence.

The judgment is reversed. The matter is remanded to the trial court with instructions to conduct an evidentiary hearing and make findings on all relevant issues in compliance with *In re E.J.*, *supra*, 47 Cal.4th at pp. 1264, 1283-1284.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Kamala D. Harris, Attorney General, Jennifer A. Neill, Senior Assistant Attorney General, Julie A. Malone, Supervising Deputy Attorney General, Charles Chung, Deputy Attorney General, for Appellant Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation.

Raimundo Montes de Oca, Public Defender, for Respondent Stanley Carter Wallace.